J.J.) (noting that the Establishment Clause does not prohibit singing the national anthem with its concluding verse "And this be our motto: 'In God is our trust'" at public school functions).

More recently, in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301 (2004), Chief Justice Rehnquist authored a concurring opinion, joined by Justice O'Connor, in which he strongly suggested that the national motto "In God We Trust" did not violate the Establishment Clause, stating as follows:

> . . . [O]ur national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R.Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). Giving additional support to this idea is our national anthem "The Star-Spangled Banner," adopted as such by Congress in 1931. 36 U.S.C. § 301 and Historical and Revision Notes. The last verse ends with these words:
>
> "Then conquer we must, when our cause it is just,
>
> "And this be our motto: 'In God is our trust.'
>
> "And the star-spangled banner in triumph shall wave

> "O'er the land of the free and the home of the brave!"

124 S. Ct. at 2319 (Rehnquist, C.J., concurring).

Justice O'Connor, in a separate concurring opinion in the *Newdow* case, reiterated that the category of "ceremonial deism . . . clearly encompasses . . . the national motto ("In God We Trust")," and that, therefore, the display of the national motto is not a constitutional violation. 124 S. Ct. at 2323 (O'Connor, J., concurring).

Thus, as shown in the above discussion, every member of the Supreme Court who has expressed any opinion about the national motto has stated that it poses no Establishment Clause problems. In fact, three current Justices of the Supreme Court, as well as ten prior Justices, have recognized that the national motto does not violate the Establishment Clause. No member of this Court, past or present, has ever suggested otherwise. Indeed, for decades, this Court and individual Justices "have grounded [their Establishment Clause] decisions in the oft-repeated understanding," *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S. Ct. 1114 (1996), that the national motto, and similar references, are constitutional. The opinions of this Court in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), *School District of Abington Township v. Schempp*, and *Engel v. Vitale*, have repeatedly affirmed the constitutionality of official references to the Nation's religious heritage and "the many manifestations in our public life of belief in God." *Engel*, 370 U.S. at 435 n.21, that form "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and that acknowledge that "our national life reflects a religious people." *Abington Township*, 374 U.S. at 213.

This Court's opinions establish as settled law that official acknowledgments, in public life, of the Nation's religious heritage and character do not constitute a prohibited endorsement of religion and do not otherwise violate the Establishment Clause. "[P]ublic acknowledgment of the [Nation's] religious heritage long officially recognized by these three constitutional branches of government" renders "farfetched" "[a]ny notion that these symbols pose a real danger of establishment of a state church." *Lynch*, 465 U.S. at 686. As pointedly explained by this Court in *County of Allegheny*, the national motto is one such permissible official acknowledgment of the role of religion in the Nation's culture and history, and it is "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603.

In sum, this Court and its Justices have consistently pronounced that our national motto "In God We Trust" does not run afoul of the Establishment Clause and that the display of the national motto is not a constitutional violation. A governmental entity's use or display of the national motto "In God We Trust" does not violate the Establishment Clause. The posting of the national motto by Davidson County on its Governmental Building is

> no more an endorsement of religion than . . . legislative prayers . . . , government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." [These] government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public

> occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, [these] practices are not understood as conveying government approval of particular religious beliefs. [They] cannot fairly be understood to convey a government endorsement of religion.

Lynch, 465 U.S. at 692-93, 104 S. Ct. at 1369-70 (O'Connor, J., concurring).

II. There is no disagreement among the Circuit Courts, which have consistently held that our national motto does not violate the Establishment Clause, that needs resolution by this Court.

The United States Courts of Appeals that have considered the issue of whether our national motto "In God We Trust" violates the Establishment Clause have uniformly held that a governmental entity's use or display of the national motto does not violate the Establishment Clause. Respondent's research has failed to uncover a single case, including any District Court opinion, in which the display of the national motto has been held to violate the Establishment Clause. Accordingly, there is no disagreement amount the Circuit Court which requires the attention of this Court.

In *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211, 116 S. Ct. 1830, 134 L. Ed. 2d 934 (1996), the Tenth Circuit squarely and unambiguously held that the national motto "In God We Trust" does not violate the Establishment Clause. The Tenth Circuit held that the national motto "clearly [has] a secular purpose, . . .

symbolizes the historical role of religion in our society, . . . fosters patriotism, and expresses confidence in the future." 74 F.3d at 216 (numerous citations omitted). The Tenth Circuit further held that "[t]he motto's primary effect is not to advance religion" and that it "does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state." *Id.* Further, the Tenth Circuit held that a reasonable observer, "aware of the phrase 'In God We Trust,' would not consider its use . . . to be an endorsement of religion." 74 F.3d at 217.

Similarly, in *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979), *cert. denied*, 442 U.S. 930, 99 S. Ct. 2862, 61 L. Ed. 2d 298 (1979), the Fifth Circuit held that the national motto did not violate the Establishment Clause. In so holding, the Fifth Circuit "affirmed the opinion of the district court," which opinion stated in part as follows:

> . . . [T]he national motto . . . has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a government sponsorship of a religious exercise. . . . Moreover, it would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion. . . .
>
> The Court notes that language in Supreme Court cases indicates that the national motto . . . does not infringe on First Amendment rights. *In School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) . . . , the Court recognized that in

> the national public life there are many manifestations of a belief in a Supreme Being which do not violate the First Amendment. As Justice Brennan explained in a concurring opinion, these various activities include the use of the motto in "In God We Trust." "It is not that the use of these fou[illegible]ords can be dismissed as 'de minimis'. . . . The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not represent the type of involvement, which the First Amendment prohibits."

O'Hair v. Blumenthal, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978) (some citations omitted).

In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), the Ninth Circuit upheld the dismissal of plaintiff's complaint, which asserted that the national motto was violative of the Establishment Clause. In holding that our national motto did not run afoul of the Establishment Clause, the Ninth Circuit stated as follows:

> It is obvious that the national motto . . . has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of religious exercise.

432 F.2d at 243.

In addition to the opinion of the Fourth Circuit below in this case, the Fourth Circuit on at least two other occasions has held that the use of the phrase "In God We Trust" does

not violate the Establishment Clause. *See North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219, 112 S. Ct. 3027, 120 L. Ed. 2d 898 (1992) (stating that the words "In God We Trust" "have been upheld as a 'patriotic and ceremonial' motto with 'no theological or ritualistic impact'"); *Hall v. Bradshaw*, 630 F.2d 1018, 1022 (4th Cir. 1980), *cert. denied*, 450 U.S. 965, 101 S. Ct. 1480, 67 L. Ed. 2d 613 (1981) (stating that references to God in governmental ceremonies, coins, and seals – such as "In God We Trust" – "do not violate the Establishment Clause").

At least four other United States Circuit Courts of Appeal have stated, or strongly suggested, that the use of the national motto does not violate the Establishment Clause. *See, e.g., Glassroth v. Moore*, 335 F.3d 1282, 1300 (11th Cir. 2003) (strongly suggesting that the national motto does not violate the Establishment Clause); *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247, 264-65 (3rd Cir. 2003) (agreeing that the use of "In God We Trust" does not violate the Establishment Clause); *American Civil Liberties Union of Ohio v. Capital Square Review and Advisory Board*, 243 F.3d 289, 301 (6th Cir. 2001) ("The Supreme Court has never questioned the proposition that the national motto can withstand scrutiny under the Establishment Clause, and we should be utterly amazed if the Court were to question the motto's constitutionality now"); *Sherman v. Community Consolidated School Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (observing that the phrase "In God We Trust" is "secular, having lost [its] original religious significance"); *citing ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), *cert. denied*, 479 U.S. 961, 107 S. Ct. 458, 93 L. Ed. 2d 403 (1986).

Accordingly, every Circuit Court that has ever addressed the constitutionality of our national motto has held that it does not violate the Establishment Clause. There is no disagreement among the lower federal courts regarding this issue that necessitates review by this Court.

III. Petitioner's Reliance on *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. __, 125 S. Ct. 2722 (2005) is Misplaced.

Petitioners argue that this Court's opinion in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. __, 125 S. Ct. 2722 (2005), which addressed the display of the Ten Commandments, compels a reversal of the Fourth Circuits' opinion in this matter. This reliance upon *McCreary County* is misplaced.

McCreary County addressed the display of Ten Commandments, which this Court has held "are undeniably a sacred text in the Jewish and Christian faiths" and are "an instrument of religion." 545 U.S. __, 125 S. Ct. at 2732; *citing Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980); *School Dist. of Abington, Township v. Schempp*, 374 U.S. 203, 224 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). In contrast to the Ten Commandments, our national motto, as discussed above, has been repeatedly held to convey a dominantly secular message which does not violate the Establishment Clause. Even if the repeated findings by this Court that our national motto is a constitutionally acceptable form of ceremonial deism is incorrect, and that it instead has some religious meaning, this Court has held that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden v.*

Perry, 575 U.S. __, __, 125 S. Ct. 2854, 2863 (2005), *citing Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, (1983); *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S. Ct. 3330 (1983); *McGowan v. Maryland*, 366 U.S. 420, 437-440, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-678, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). While the Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity", *Walz*, 397 U.S. at 668, the Establishment Clause was never intended to "entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *County of Alleghany*, 492 U.S. 573, 623 109 S. Ct. 3086 (O'Connor, J. concurring).

Petitioners argue that the opinion in *McCreary* altered the first prong of the *Lemon* test to require only an "ostensible and predominant purpose of advancing religion." 545 U.S. __, 125 S. Ct. at 2733. However, a review of the opinion in *McCreary* reveals that the guidance set forth in *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985), "that a statute must be invalidated if it is entirely motivated by a purpose to advance religion," and in *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1983) that the purpose inquiry looks to determine whether government "action was motivated wholly by religious considerations," was not overruled. Indeed, this Court cited *Wallace* and *Lynch* with approval in numerous places in its *McCreary* opinion. In any event, it his difficult to fathom how the display of our national motto, which conveys a secular message, could have the "ostensible and predominant purpose of advancing religion."

With regard to the petitioner's second argument regarding the application of the endorsement test to the assessment of secular purpose, this Court noted in *McCreary* that observers are "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." 545 U.S. at __, 125 S. Ct. at 2737, *citing Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266. In this case, the observer is a citizen who is presumed to know that "In God We Trust" is our national motto, and knows that such words have been displayed for decades on government buildings and on the coins and paper money he or she carries in his or her pockets.

Petitioners rely completely on the *McCreary* decision handed down by the Supreme Court, but fail to mention whatsoever the *Van Orden v. Perry*, 575 U.S. __, __, 125 S. Ct. 2854, 2863 (2005) opinion handed down the very same day, which upheld the constitutionality of the display of the Ten Commandments on the grounds of the Texas State Capitol. In choosing not to apply the *Lemon* test in *Van Orden*, the Court's plurality opinion noted that "the factors identified in *Lemon* serve as no more than helpful signposts." 575 U.S. at __, 125 S. Ct. at 2861, *citing Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973). In any event, Justice Breyer's opinion in *Van Orden* notes that courts must look at the history, purpose and context of a particular display in determining whether it is a symbolic endorsement of religion. *Van Orden v. Perry*, 575 U.S. at __, 125 S. Ct. at 2869 (2005) ("I see no test-related substitute for the exercise of legal judgment"). Consideration of the history, purpose and context of our national motto, in addition to the decisions and opinions of this Court addressing our national motto, demonstrate that it does not constitute a symbolic endorsement of religion and does not violate the Establishment Clause.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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In The
Supreme Court of the United States

CHARLES F. LAMBETH, JR.,
AND MICHAEL D. LEA,

Petitioners,

v.

THE BOARD OF COMMISSIONERS OF
DAVIDSON COUNTY, NORTH CAROLINA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

1.

This is not a case about the national motto as such

The first and second arguments in the brief in opposition rehearse the dicta in this Court and the holdings in the lower courts concerning the national motto as such and its use on coin and currency. None of those cases considered legislative motive or the development of the presentation of the display. The case presented here is different in kind from those cases. It involves the display of "In God We Trust" unidentified as the national motto, recently installed as the most prominent feature of the main County building, and intended to and reasonably perceived to state a religious message. This is, as the Fourth Circuit recognized,

> "governmental action which goes beyond traditional uses of the phrase, as discussed in the [Supreme] Court's dicta and by our precedents, which have been limited to the phrase's use on coins and currency, and as the national motto."

Pet. App. 10a. Accordingly the Fourth Circuit applied the *Lemon*[1] and endorsement tests, rather than a ceremonial deism or other analysis, to determine whether the Establishment Clause was infringed.

This is not just another national motto case, any more so than if the Congress enacted tomorrow that "Equal Justice Under Law" should be removed from the main pediment of this Court and replaced with "In God We Trust," with the purpose stated in the legislative history as

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[1] *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971)

being to bring this Nation back to a fundamental belief in God as the source of our laws.

This case presents allegations that the unidentified creed "In God We Trust" was displayed with a purpose to send a religious message and in fact sent such a message to an objective observer. This case is properly analyzed, on a motion to dismiss for failure to state a claim, under the rules formulated in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. ___, 125 S. Ct. 2722 (2005.)

2.

Analysis of *Van Orden v. Perry*, 545 U.S. ___, 125 S. Ct. 2854 (2005) demonstrates conclusively that the decision below is irreconcilable with *McCreary County v. ACLU of Kentucky* and therefore should be remanded for reconsideration

McCreary County ruled that the first prong of *Lemon* requires only an "ostensible and predominant purpose of advancing religion," 545 U.S. ___, 125 S. Ct. at 2733, not an entirely religious purpose.[3] A "primary" or a "preeminent" purpose to advance religion is sufficient to state a claim. 545 U.S. ___, 125 S. Ct. at 2735, *quoting Edwards v. Aguillard,* 482 U.S. 578, 594 (1987). It further held that the endorsement test, with its assessment of context and history, applied to the assessment of secular purpose, 545 U.S. ___, 125 S. Ct. at 2736-37. The Fourth Circuit failed to heed either of these rules. If it had, it would have found that Petitioners had stated a claim.

---

[3] Petitioners argued in the Fourth Circuit that "dominant" purpose was the test. Pet. App. 6.

Respondent argues that *Van Orden v. Perry*, 545 U.S. ___, 125 S. Ct. 2854 (2005), requires that the governmental religious statement made here be upheld. Respondents recognize, however, that *Van Orden* produced no majority opinion, and that the separate concurrence of Justice Breyer notes that courts "must look at the history, purpose and context of a particular display in determining whether it is a symbolic endorsement of religion." Brief in Opposition, 16. Petitioners agree with this proposition, and a fuller consideration of Justice Breyer's opinion drives home the point of how clearly *McCreary County* controls the case presented here.

Van Orden ruled that the religious display at issue there could remain in place, while *McCreary County* upheld a preliminary injunction against the continued maintenance of its display. The difference in result came about because Justice Breyer joined the opinion of the Court in *McCreary*, whereas in *Van Orden* he concurred in the result but not in the plurality's reasoning. He took differing views of (1) a Ten Commandments monument on State Capitol grounds, donated years ago by a private civic organization and expressly said by the donor to be for the purpose of combating juvenile delinquency, being one of 38 monuments and markers variously scattered elsewhere about the Capitol grounds, of which no record of official motivation survived and which had gone legally unchallenged for some forty years, and (2) recently posted, large, readily visible copies of the Commandments in courthouses, surrounded by historical documents featuring governmental religious statements, as to which suit had been brought shortly after their installation. Justice

Breyer weighed all these differences of fact in deciding whether the constitutional line had been crossed. By his own admission the critical difference was that the Capitol display had been in place, unchallenged, for some forty years. 125 S. Ct. at 2870 (" . . . a further factor is determinative here. . . . 40 years passed . . . "). By also expressly approving of Justice O'Connor's concurring opinion in *McCreary County, see Van Orden*, 125 S. Ct. at 2872, and by expressly joining the opinion of the Court in *McCreary County*, he made plain that while in his view the display of a long-unchallenged religious text as one among many placements was constitutionally permissible, the very same text was not permissible in a new, aggressive, untraditional imposition – that his letting pass the Capitol display was not a signal to those who would seize upon the verisimilitude of newly proposed religious impositions in the public sector to those essentially grandfathered by the passage of time.

The case at bar falls clearly on the *McCreary County* side of Justice Breyer's line. The complaint alleges that the predominant driving force of the recently imposed display was to raise the visibility of a religious motif, signaling to all who entered the Governmental Center that a singular religious credo governed within. The affront is distinctly more substantial than was the merely seasonal crèche in *Allegheny County v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989).

CONCLUSION

The Fourth Circuit plainly erred in imposing a requirement that entirely religious purpose be pleaded, and that history and context were not to be considered in assessing purpose. The minimum required here is to reverse the judgment below and remand for reconsideration in light of *McCreary County*.

Respectfully submitted,

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